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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1661

CHARLES F. MARCH and VERNA M. MARCH, his wife,
Petitioners,

vs.

ALLIS-CHALMERS CORPORATION, DAVID SCOTT, individually and as President of ALLIS-CHALMERS CORP., PRICE HUGHES HOOKER, J. CHESTER KRALL, CHARLES F. KING, CHRISTIAN V. WAGMAN, DONALD E. RENTZEL, ROGER FURST, JACK SHEARER, THE BOARD OF DIRECTORS OF ALLIS-CHALMERS CORP., its supervisors, managers, foremen and officers,
Respondents.

APPEAL FROM THE FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT No. 77-1801.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter Statement of the Case

The present matter involves a lawsuit which was instituted by Charles F. March, and his wife, Verna, against Allis-Chalmers Corporation (hereinafter referred to as "Allis-Chalmers" or "the employer") for personal injuries sustained by Mr. March (hereinafter referred to as "the employee") on April 19, 1973, while in the course of his employment with Allis-Chalmers in York County, Pennsylvania. On April 18, 1975, the Petitioner-employee commenced this action by

filing a Praecipe to Issue a Writ of Summons in the Court of Common Pleas, York County, Pennsylvania. Thereafter, on July 31, 1975, Petitioners filed a Complaint against Allis-Chalmers, the Board of Directors, and numerous officers and employees of that company (R. 4a-12a). The Complaint, which was divided into five (5) Counts, including two derivative Counts (II and IV) on behalf of the wife Plaintiff, recited in relevant part the following averments:

> "(1) That Defendant Corporation, through its President, Board of Directors, Officers and Agents, unlawfully conspired to speed up production output of the corporation in order to increase profits by intentionally violating Pennsylvania safety laws and regulations, to wit, the Act of May 18, 1937, P.L. 654, as amended, 43 P.S. § 25-2. The same being an unlawful combination which was further encouraged by the conscious knowledge that the corporation, its officers, agents and employees, could only allegedly suffer limited liability by virtue of the violation of said safety laws as provided by the Act of June 2, 1915, P.L. 736, as amended 77 P.S. § 1 *et seq.* . . .
>
> . . . Specifically, the Defendants conspired, agreed, and successfully changed the safe practice of turning off a boring mill while cleaning it and substituted and established the hazardous, unlawful and unsafe practice of cleaning the boring mill while it was in operation thereby increasing output and placing the plaintiff and others in a position of peril and jeopardy . . ."
>
> (2) . . . "On or before April 19, 1973, as a direct result of certain alleged immunities and limits of liability afforded by the Workmen's Compensation Act of June 2, 1915, P.L. 736, as amended 77 P.S. § 1 *et seq.*, the Defendants have intentionally, knowingly recklessly and wantonly required the plaintiff to work upon a moving boring mill when they knew or should have known that the practice was hazardous, unsafe and in violation of the Act of May 18, 1937, P.L. 654, as amended, 43 P.S. § 25-2. The Defendants, knowing of the potential hazards

> provided by requiring the plaintiff to work in violation of said safety act failed to provide the plaintiff with specialized training thereby intentionally exposing him and other persons to hazardous working conditions solely for the purpose of raising and increasing company profits . . ."
>
> (3) . . . "On or before April 19, 1973, the plaintiff was covered by the provisions of an agreement between the International Association of Machinists and Aerospace Workers and the Allis-Chalmers Corporation, York Plant" . . . "the said contract provided the requirement that the Defendant Corporation should have taken reasonable measures to prevent job hazards to which employees are subject to their places of work" . . . "The Defendant breached the said agreement by failing to take reasonable measures to prevent job hazards . . ."

On August 14, 1975, Defendants Filed an Amended Answer to the Complaint, wherein they averred the following affirmative defenses: (1) the plaintiffs are barred from maintaining any of the causes of action alleged in their Complaint by the exclusive remedy provisions of the Pennsylvania Workmen's Compensation Act, Article 3, § 303, P.L. 782, No. 263 § 6, as amended December 5, 1974; 77 P.S. 481 (a); (2) plaintiff, Charles March, was precluded from maintaining a cause of action in Count V of the pleading for breach of the collective bargaining agreement by his failure to exhaust the exclusive remedies and procedures provided in that agreement.

Shortly thereafter the suit was removed to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1441, and 29 U.S.C. § 185(a). The plaintiffs thereafter filed a Motion to remand the case to state court, which was denied by an Order of the District Court on January 9, 1976.

On October 4, 1976, the employer filed a Motion for Summary Judgment on the grounds that the exclusive remedy

provisions of the Pennsylvania Workmen's Compensation Act, Article III, § 303, as amended, 1974, Dec. 5, P1L, 782 No. 263 § 6, 77 P.S. § 481, barred the employees common law action and that the employees failure to exhaust the exclusive remedies and procedures contained in the collective bargaining agreement between plaintiff's labor union and Allis-Chalmers Corporation, York Plant (R. 2a).

On January 4, 1977, oral agreement relating to the aforementioned Motion was held before the Honorable R. Dixon Herman, and on March 9, 1976, the District Court ruled that there were no issues of material effect and that defendants were entitled to summary judgment as a matter of law. The plaintiffs appealed the judgment to the United States Court of Appeals for the Third Circuit. On February 22, 1978, the Court of Appeals entered an Order affirming the judgment of the District Court. Thereafter on May 17, 1978, plaintiffs filed a Petition for Writ of Certiorari to this Honorable Court.

The plaintiff-employee has admitted from the outset of this action that he had sustained his injuries while in the course of his employment with Allis-Chalmers, and that he had accepted financial benefits from his employer pursuant to the Pennsylvania Workmen's Compensation Act. Furthermore, with respect to his cause of action for breach of the collective bargaining agreement between his union and Allis-Chalmers the plaintiff has conceded that he never filed a grievance or exhausted the remedies provided in the collective bargaining agreement prior to instituting this lawsuit.

ARGUMENT

I. The Federal District Court For the Middle District of Pennsylvania Has Decided the Question of the Employee's Right to Sue His Employer For Injuries Sustained in the Course of His Employment In Accordance with Existing Substantive Law of the Commonwealth of Pennsylvania.

The Pennsylvania Workmen's Compensation Statute, Title 77 P.S. § 1 *et seq.*, was enacted as a humanitarian measure to impose absolute but exclusive liability upon an employer for injuries sustained by an employee in the course of his employment; *Burke v. Duquesne Light Company,* 231 Pa. Super. 412, 332 A2d 544 (1974), *Dupree v. Barney,* 193 Pa. Super. 331, 163 A2d 901 (1960). The Statute contains an exclusive remedy clause in Article III, Section 303 (a); 77 P.S. § 481 (a), which sets forth the following:

> "The liability of an employer under this Act shall be exclusive and in place of any and all other liability to such employees, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in Section 301 (c) (1) and (2) or occupational disease as defined in Section 108."

The Courts in Pennsylvania have uniformly construed the exclusive remedy provisions of the Workmen's Compensation Act to mean that the remedy provided under the Act is exclusive of all common law actions. *Hyzy v. Pittsburg Coal Company,* 384 Pa. 316, 121 A2d 85 (1956); *Hartwell v. Allied Chemical Corporation,* 457 F2d 1335 (3rd Cir. 1972). Thus, the Courts have held that an employee and his spouse are barred from suing his employer at law with respect to injuries that are compensable under the Act. *Scott v. C. E. Powell Co.,* 402 Pa. 73, 166 A2d 31, 34 (1960); *Hartwell v. Allied Chemical Corporation,* 320 F. Supp. 75, 77 (E. D. Pa. 1970) aff'd 457 F2d 1335 (3rd Cir. 1972).

The employee in the present matter concedes that he sustained his injuries during an accident while in the course of his employment with Allis-Chalmers Corporation. Moreover, he admits that he accepted Workmen's Compensation benefits from his employer pursuant to the Act. Yet, he contends he has the right to maintain a common law action against his employer because he has averred in his Complaint that his employer committed an intentional tort of Conspiracy, which he asserts is a cause of action that is outside the exclusive remedy provisions of the statute. The Petitioner premises this position on an inaccurate and misleading assertion that the judicial authorities in Pennsylvania have recognized an exception to the exclusive remedy provision of the Act where an employer has committed intentional tortious conduct.

The Pennsylvania Courts have delineated an exception to the applicability of the exclusive remedy provision of the Act where an employer intentionally inflicts an injury upon an employee, *Readinger v. Gottschall,* 201 Pa. Super. 134, 191 A2d 694 (1963); *Beale v. Holliman,* 8 D & C 2d 758 (1958). However, the Courts of the Commonwealth have uniformly and repeatedly ruled that accidental injuries resulting from an employer's deliberate or intentional violations of a statute were within the scope of the Act, and that suits at common law were barred by the exclusive remedy provisions of the Statute. *Evans v. Allentown Portland Cement Co.*, 433 Pa. 595, 252 A2d 646 (1969); *Shick v. Good Humor Corp.*, 438 F2d 336 (3rd Cir. 1971); *Ulincy v. National Dust Collector Corporation, supra.*

The *Evans* and *Ulincy* decisions, *supra,* have established the principle that the determination of whether a common law action avoids the bar of the exclusive remedy provisions of the Statute rests solely upon the accidental or nonaccidental character of the injury sustained by the employee. Since the Petitioner-employee has pleaded an accidental injury the

question of whether a conspiracy to violate a statute is or is not an intentional tort is not relevant to the determination of the applicability of the statutory defense to bar his causes of action in Counts I through IV of his Complaint.

In the *Evans* case, the deceased minor-employee was assigned by his employer to hand-shovel rock spillage onto a conveyor belt at a point in close proximity to an unprotected area of the belt. The minor sustained fatal injuries when he lost his footing and was dragged into the belt. Plaintiff's complaint alleged wilful, wanton, reckless, negligent, careless, and unlawful acts of Portland Cement Company in connection with the installation and maintenance of the belt and in connection with the assignment of the minor to those duties, allegedly in violation of certain Department of Labor and Industry Rules. The Supreme Court of Pennsylvania held that even though the decedent was allegedly killed as a result of the employer's wilful and unlawful violation of statutory provisions, the act barred common law recovery.[1]

In *Ulincy v. National Dust Collector Corporation, supra,* the District Court for the Eastern District of Pennsylvania applied the decision in the *Evans* case as the controlling authority with respect to the immunity of an employer from common law liability for accidental injuries suffered by an employee even where the employer is charged with intentional violations of statute. The District Court noted in that decision:

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[1] While the petitioner has failed to present an argument to support his cause of action in Count III of his pleading, it is noted that the material averments in that Count of intentional, reckless, and wanton misconduct by the employee are substantially the same as the allegations in the plaintiff's Complaint in the *Evans* case, which was dismissed by the Supreme Court of Pennsylvania pursuant to the exclusive remedy provisions of 77 P.S. § 481 (a).

"Evans is in accord with the overwhelming weight of authority on this point. The general principle as stated in 2 Larson, the Law of Workmen's Compensation § 68.13 (1975) (hereinafter cited as Larson) is as follows:

'Since the legal justification for the common law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common law liability of the employer cannot be stretched to include accident injuries caused by gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute or other misconduct short of genuine intentional injury.' "

The District Court in the *Ulincy* decision referred to numerous judicial decisions in other jurisdictions wherein the Courts have held that the employee must aver an *intentional injury* to plead a case that will fall outside the statutory bar to common law suits. *Ross v. State of New York*, 187 N.Y.S. 2d 13 (1959); *Wilkinson v. Achbar*, 131 A.2d 51 (N.H. 1957) and *Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A.2d 129 (1969). In each of those cases, the Appellate Courts dismissed common law suits containing averments of intentional acts or misconduct by an employer, because their employees' injuries were accidental or unintentional. The rationale of the Supreme Court of New York in the *Ross* decision upholding the dismissal of an employees action at law is particularly relevant to the present issue. The Court in that case made the following ruling:

"We think, however, from the undisputed facts revealed in the record that a wilful intention to harm decedent cannot be spelled out from such facts and that viewed in the light most favorable to the claimant nothing more than gross negligence could possibly be found. The common-law liability of an employer cannot be stretched to include accidental injuries caused by gross negligence or other misconduct of the employer short of genuine intentional injuries (Larson's Workmans' Compensation Law, Vol. 2, Sections § 68.13 and § 68.21)."

The District Court applied the criterion set forth in the *Evans* and *Ulincy* cases to determine that the Petitioner-employee had not plead a cause of action that is not precluded by the exclusive remedy clause of the Pennsylvania statute. The Petitioner states in his Brief that the District Court recognized on Page three (3) of its Opinion that the exclusive remedy provisions of the statute could be avoided by a pleading which averred that the employer has committed intentional tortious conduct; yet the Petitioner fails to note that in the following sentence of its Opinion, the District Court made the following assertion:

"In view of the fact that the tort action is founded and the nonaccidental character of the injury insofar as the defendant employer is concerned, the courts have uniformly differentiated between these instances where there is genuine intentional injury inflicted by the employer and those where the injury sustained is simply accidental as the result of an intentional misfeasance or violation of a statutory duty."

The Petitioner also erroneously represents in his Brief that the District Court grounded its ruling upon a characterization of the cause of plaintiff's injury as employer malfeasance rather than intentional tortious conduct. Instead, the Court viewed the Complaint in the light most favorable to the employee and ruled that even if the employee averred the commission of an intentional tort, he has still failed to evade the statutory bar because he has not pleaded that his injuries were intentionally inflicted by the employer. Again the Courts have held that the test is not the characterization of the employer's conduct but the character of the employee's injury. *Evans v. Allentown Portland Cement Company, supra; Ulincy v. National Dust Collector Company, supra; Hyzy v. Pittsburgh Coal Company*, 384 Pa. 316, 121 A2d 85 (1956).

Finally, the Petitioner had raised the argument that since he has sued the Defendants in their individual capacities as well as in their capacity as representative of the Corporation they may be held individually liable under the "fellow employee" statute, 77 P.S. § 72, for any intentional wrong committed upon the person of the plaintiff. Significantly, this argument was never raised either in the District Court or the United States Court of Appeals. Nevertheless, the provisions of that statute abrogate common law liability of co-employees of an injured party while in the course of their employment, except for intentional wrongs. *Jadash v. Goeringer,* 442 Pa. 451, 275 A2d 58 (1971); *Gunshore v. Onore,* 63 Lug. L. Reg. 63 (1973). The Respondent submits that the same criterion relative to the determination of the employees right to sue his employer at law for injuries he sustained in the course of his employment applies to his right to sue a fellow employee for injuries sustained in the course of his employment. *Jadash v. Goeringer, supra.*

Hence, the employee is also barred from maintaining an action against his co-employees for the injuries he sustained in this accident.

II. The District Court has Properly Upheld the Constitutionality of the Pennsylvania Workmen's Compensation Act In Overruling Petitioner's Contentions That Various Provisions of the Statute Violate Constitutional Due Process and Equal Protection Standards.

A. The Conclusive Presumption Clause of the Pennsylvania Workmen's Compensation Act is not Violative of Constitutional Due Process Standards.

The Petitioner attacks the validity of the Conclusive Presumption Provisions of the Pennsylvania Workmen's Compensation Act, Title 77 P.S. § 461, by contending that the Statute raises such a presumption without informing an

employee at the commencement of his employment of his right to elect either the statutory or the common law remedies. He asserts that the failure of the statute to require that an employee be informed of his election of remedies, renders a resultant failure to elect as an involuntary waiver of a right to sue, which he argues, constitutes, a taking of a property right without due process of law.

The provision which the Petitioner attacks as unconstitutional sets forth that in every contract of hiring a conclusive presumption arises that the parties have accepted the provisions of Article III of the Act and have agreed to be bound thereby unless an extension of such contract, an express statement in writing from either party to the other that the provisions of Article III of the Act are not intended to apply. Title 77 P.S. § 431, a counterpart to the statutory presumption provision of the Act, states that acceptance of the provisions of the Statute may be implied in the employee's acceptance of the employment contract. Hence, the terms of the statute are incorporated into the employment contract and any vested contract rights which the employee are derived from the Statute. *Demartino v. Zurich Insurance Company,* 307 F. Supp. 571, 573 (E.D. Pa. 1969).

In arguing against the constitutionality of the Pennsylvania Act, the Petitioner fails to recite that he has voluntarily accepted the financial benefits which he is entitled under the Statute for his employment related injuries. Yet, his acceptance of compensation under the Act is in itself a clear indication of his acceptance of the Statute. *Hartwell v. Allied Chemical Corporation,* 320 F. Supp. 75, 76 (E.D. Pa. 1970).

Furthermore, the Petitioner disregards the compelling and beneficial purposes which the Pennsylvania statute fulfills. The statutory presumption does not result in a taking away of a property right, but rather an exchange of one remedy for another. The employee receives economic insurance that his

employment-related injuries will be compensated. He surrenders the right to sue employers or fellow employees for negligence but he no longer must prove negligence, his own contributory negligence is no longer a bar, and he too can no longer be sued for negligence by a fellow employee. *Jadash v. Goeringer, supra.*

The District Court noted in its Opinion that the rationale for the statutory presumption is not that of a waiver of rights but in fact a presumption of more favorable treatment of the employee. And on several previous occasions the United States Supreme Court has upheld the beneficial purposes derived from the exchange of remedies:

> "It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount and according to a reasonable and definite scale, by way of compensation for loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependants. Nor can it be deemed arbitrary and unreasonable from the standpoint of the employee's interests, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative, upon proving facts of negligence that often were difficult to prove, and to substitute a system under which, in all ordinary cases of accidental injury, he is sure of definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale." *New York Central Railroad Co. vs. White,* 37 S. Ct. 247, 251, 243 U.S. 188 (1917); *Mountain Timber Co. vs. Washington,* 37 S. Ct. 260, 243 U.S. 219 (1917).

To sustain the employee's position with respect to the constitutional validity of the statutory presumption provision of the Workmen's Compensation Act in Pennsylvania, Title 77 P.S. § 461, and its counterpart, the implicit acceptance clause of that Act, Title 77 P.S. § 431, would defeat the essential purpose of that Statute to provide compensation to employees for work-related injuries irrespective of the question of negligence, and would encourage employers to reject the act. As this Court recently noted in the case of *O'Neill vs. U.S.*, 450 F. 2d 1012 (3rd Cir. 1971):

> "That he may no longer be immune to common law suits even though he participates in and contributes to the compensation program would be a consideration of great weight to an employer. In this industrial age, a viable Workmen's Compensation law is a necessity as a matter of public policy."

B. The Exclusive Remedy Provisions of the Pennsylvania Workmen's Compensation Act, 77 P.S. Section 481 (a) which Bars an Employee from Bringing a Suit at Law Against an Employer for a Violation of a Safety Law do not Violate any Constitutional Safeguards Afforded Under the Equal Protection Clause.

The Equal Protection Clause of the Constitution safeguards individuals from intentional and invidious discrimination in the enactment and enforcement of laws. *State ex rel. Mulhein vs. McHenry,* 31 Conn. Super. 172, 326 A.2d 132 (1974). However, the equal protection standard does not prohibit all discrimination, but forbids only invidious or arbitrary discrimination by statute or other state action. *People ex rel. Jones vs. Adams,* 350 N.E. 2d 767 (Ill. Appl. 1976). The Constitutional standard under this clause is whether the challenged state law or action rationally furthers a legitimate state purpose or interest. *San Antonio Independent School District vs. Rodriguez,* 93 S. Ct. 1278, 411 U.S. 1, 36 L.Ed. 2d 16 (1973).

The Workmen's Compensation Act adopted by the Commonwealth of Pennsylvania certainly furthers a significant state interest. The statute is authorized by the police powers of the state and is frequently referred to as a humitarian measure. *Dupree vs. Barney, supra.*

> "The statute was designed to impose absolute liability upon an employer when his employee suffered injury in the course of the employment. Such absolute liability in the amount of the Workmen's Compensation Agreement, lies against the employer regardless of fault and therefore a suit against the employer by the employee is not permitted under the Act." *Burke vs. Duquesne Light Co.*, 231 Pa. Super. 412, 332 A.2d 544 (1974).

Furthermore, there exists a rational basis for the legislature to shield employers who have been paid out Workmen's Compensation benefits from liability at law for injuries sustained by employees in an accident in the course of their employment, while precluding employees who commit statutory violations from the benefits of the statute. Under the provisions of 77 P.S. § 431, prior to its amendment of 1974, if the parties accepted the provisions of the statute, the employer would be required to pay compensation to his employee for personal injuries sustained in the course of his employment. However, an employee who was injured while committing a statutory violation would be excluded from compensation benefits because he was not injured in the course of employment. *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 7 A.2d 302 (1939). The Pennsylvania Supreme Court noted in the *Bashore* decision that the rationale for this particular statutory exclusion is that the Pennsylvania Constitution does not provide the Legislature with the power to provide compensation to employees whose injuries do not arise in the course of their employment. *Rich Hills Coal Co. vs. Bashore, supra.* Thus, an employee may be barred from obtaining Workmen's Compensation benefits, because his statutory violation breaks the

continuity of employment; however, he may still have a remedy at law against his employer, though he would be subject to the employer's defense that the employee's statutory violation caused his injuries.

On the other hand, where an employee sustains injuries in an accident resulting from an employer's statutory violation, the employee has nevertheless sustained the injury while within the course of his employment, and is thereby eligible to receive the benefits provided under the statute and his contract of employment and the employer would be required to pay the benefits to the injured employee.

Yet, it would defeat the purpose of the statute to subject an employer, who has elected to accept the imposition of absolute, but limited, liability for injuries sustained by an employee in the course of his employment, to common law liability for those same injuries resulting from his breach or violation of a safety statute. *Hartwell v. Allied Chemical Corporation*, 320 F. Supp. 75 (E.D. Pa. 1970).

The statute was enacted to impose upon an employer absolute, but exclusive, liability for injuries sustained by an employee in the course of his employment. *Burke v. Duquesne Light Company, supra.* If any employee were allowed to collect compensation under the statute, and also to recover damages at common law for the same injuries, no employer would elect to participate in the system.

In short, the statute embodies a rational and reasonable classification of employees entitled to compensation. And the judiciary has upheld these classifications on the basis of the necessary and viable public policy purposes which are served by the statute. Hence, there is no equal protection violation in restricting employees to their statutory remedy when they are injured in accidents resulting from employer's statutory violations, but relegating employees to pursue a common law

remedy in instances where they commit acts such as violations of a statute, which place them outside the scope of course of their employment.

III. The Petitioner is Barred From Maintaining a Cause of Action For Breach of a Provision of the Collective Bargaining Agreement Between Allis-Chalmers and Petitioner's Labor Union By his Failure to Exhaust the Grievance Procedure contained in that Agreement.

In the present matter the Petitioner averred a cause of action in Count V of his Complaint for personal injuries resulting from the Respondent-employer's breach of § 26.1 of the Collective Bargaining between Allis-Chalmers and the employees labor union. Section 26.1 of that Agreement sets forth that the Company will provide its employees with a safe place to work.

Article I of the Collective Bargaining Agreement provides that the Company recognizes the Union as the sole and exclusive collective bargaining agency for all production and maintenance employees, and sets forth that the provisions of the labor contract shall apply to all employees covered by the Agreement. Article XXI of the Collective Bargaining Agreement outlines specific procedures to be followed in the event of any contract grievance. In Subsection 21.1 of that Article a grievance is defined as . . . "A controversy between the Company and the Union or between the Company and an employee covered by this Agreement concerning compliance with the provisions of this Agreement."

In the case of *Republic Steel Corporation v. Maddox,* 397 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1964) this Court enunciated the well established principle that an individual employee who claims that his employer has violated a Collective Bargaining Agreement is bound by the terms of that agreement as to the method of enforcing his claim, and where

an exclusive grievance procedure has been agreed upon the employee must pursue that route before seeking relief in court, and failure to exhaust contractual remedies will constitute a defense by the employer.

In the case *Harris v. Chemical Leaman Tank Lines, Inc.,* 437 F2d 167, 170 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit ruled that where responsibility for processing disputes under a labor contract is vested solely in the union, the employee must rely upon the union to exhaust contractual remedies in his behalf, and to enforce compliance with those remedies by the employees.

The District Court for Wisconsin has recently ruled that when a collective bargaining agreement makes the labor union the exclusive bargaining agent for the employees, federal law requires an employee with a grievance to attempt use of the contract grievance procedures before commencing an action in Court. *Mikelson v. Wisconsin Bridge and Iron Co.,* 359 F. Supp. 444 (D.C. Wisc. 1973).

The Collective Bargaining Agreement in effect between Allis-Chalmers and the Petitioner's labor union on the date that the Petitioner sustained his injuries which form the basis for his cause of action against Allis-Chalmers, designates the labor union as the exclusive bargaining agent for employees of Allis-Chalmers and provides for specific greivance procedures to enforce a claim against the employer for breach thereof. The Petitioner has conceded that he failed to utilize the grievance procedure outlined in the agreement in pursuing his claim for violation of § 26.1 of the contract. In light of the decisions cited above, he is therefore barred from maintaining a cause of action at law for the contractual breach.

The employee, however, argues that he derives certain personal rights as a third-party beneficiary of the contract which

are separate and distinct from the rights set forth in the contract itself and which allow him to maintain his cause of action. Specifically, he maintains that since the contract does not address itself to the monetary remedy he seeks, and as the grievance procedures outlined in the agreement are insufficient to redress the alleged breach by his employer, he has the right to recover damages against the employer as a third-party beneficiary of that contract. The employee's argument disregards the following fundamental principle relative to the rights of third-party as stated by the Pennsylvania Supreme Court:

> "The foundation of any right the third-party may have, whether he is a donee beneficiary or a creditor of the promisee, is the promisor's contract. Unless there is a valid contract, no right can arise in favor of anyone. Moreover, the rights of the promisee must be limited by the terms of the promise . . . Broadly speaking, not only must any formal requirements be complied with, but the beneficiary also takes subject to the due performance of all express and implied conditions affecting the promise in which he is interested." *Williams v. Paxon Coal Company*, 356 Pa. 468, 471, 31 A2d 69, 70 (1943).

In the case of *Falsetti v. Local Union No. 2026, United Mine Workers*, 400 Pa. 145, 161 A2d 882, 893 (1960), the Pennsylvania Supreme Court applied these same concepts in holding that the rights of an employee as a third-party beneficiary to a Collective Bargaining Agreement are derived solely from the Agreement itself.

The application of basic legal principles governing the rights of a third-party beneficiary to a contract establish that in the present matter the employee's rights and remedies under the collective bargaining agreement between Allis-Chalmers and the employee's labor union are limited to the provisions in the agreement itself. Since he failed to invoke and exhaust those procedures prior to instituting his cause of

action in Count V of the Complaint the Plaintiff-Employee, is barred from maintaining his cause of action. Accordingly, the District Court properly dismissed Count V of the Complaint.

Conclusion

United States Supreme Court rule 19 relative to considerations governing review on certiorari provides that a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefore. The Petition presently before this Honorable Court fails to set forth a single, compelling reason to invoke review of the decision of the United States District Court and the *per curiam* decision of the United States Court of Appeals for the Third Circuit.

The decision granting summary judgment in favor of the Respondent-employer is substantiated by the statutory and judicial authorities in the Commonwealth of Pennsylvania relative to the applicability of the exclusive remedy provisions of the Pennsylvania Workmen's Compensation Act, 77 P.S. § 481(a), as a bar to the employee's cause of action to recover against his employer for an "accidental injury." Moreover, the contentions that the statute is violative of constitutional equal protection and due process standards is equally unmerited for the Pennsylvania Act, as every other Workmen's Compensation Act in this Country, was enacted for the benefit of employees, and with the purpose of ensuring that workers received some financial compensation for injuries they sustained in employment-related accidents, irrespective of fault. These statutes have withstood allegations of similar constitutional violations for over sixty (60) years and have been upheld by the Courts on the basis of the humanitarian public policy they embody. *Welsh v. Pittsburgh Terminal Coal Corp., supra.*

Finally, the employee's argument that he has a right as a third-party beneficiary to enforce a cause of action at law for breach of a Collective Bargaining agreement in contrary to the principles established by this Court in *Republic Steel Corporation v. Maddox, supra.*

According, the Respondent, Allis-Chalmers Corporation, requests that this Honorable Court deny the Petitioner for Certiorari.

Respectfully submitted,

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